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CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

JAMES S. HURVITZ et al., Plaintiffs and Appellants, v. ST. PAUL FIRE AND MARINE INSURANCE COMPANY, Defendant and Respondent.	B158885 (Los Angeles County Super. Ct. No. BC248779)

APPEAL from a judgment of the Superior Court of Los Angeles County, David A. Horowitz, Judge. Affirmed.

King & Ferlauto, William T. King and Thomas M. Ferlauto for Plaintiffs and Appellants.

Carlson, Calladine & Peterson, Robert M. Peterson, Asim K. Desai and Patrick M. Quigley for Defendant and Respondent.

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* Pursuant to California Rules of Court, rules 976(b) and 976.1, this opinion is certified for publication with the exception of parts IV, V, and VI.

Appellants James S. Hurvitz, M.D., and his wife Jackie Hurvitz brought suit against respondent St. Paul Marine and Fire Insurance Company (St. Paul) for (1) bad faith breach of insurance contract based on St. Paul's decision to settle a third party's claims without the Hurvitzes' consent and over their objections and (2) breach of oral settlement agreement. The trial court granted St. Paul's motion for summary judgment concluding that the Hurvitzes' consent was not required and that no final settlement agreement had been consummated. We hold that where an insurance policy grants to the insurer the "right and duty" to defend any claim or suit for covered injury or damage, including claims and suits that are "groundless, false or fraudulent" and the "right to settle any claim or suit within the available limits of coverage," the insurer need not obtain the insured's consent prior to settling with a third party even though it leads to the loss of the insured's potential claim for malicious prosecution, injures their reputation, or impacts their future insurability. We further agree with the trial court that no final settlement agreement was breached, and, therefore, affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

The following are the agreed facts as set forth in the parties' briefs.

The Insurance Policy

Respondent St. Paul issued a professional office insurance policy package to Dr. Hurvitz effective from January 1, 1997, to January 1, 1998. The package included Commercial General Liability (CGL) coverage for bodily injury, property damage, personal injury, and advertising injury. The policy had an advertising injury limit of $500,000. The "advertising injury liability" provision provided: "We'll pay amounts any protected person is legally required to pay as damages for covered advertising injury that: results from the advertising of your products, work or completed work; and is caused by an advertising injury offense committed while this agreement is in effect." The term "advertising" was defined to mean "attracting the attention of others by any means for

the purpose of seeking customers or increasing sales or business." The term "advertising injury" was defined to mean "injury, other than bodily injury or personal injury, caused by an advertising injury offense." The term "advertising injury offense" was defined to mean "any of the following offenses: Libel or slander. Making known to any person or organization written or spoken material that belittles the products, work or completed work of others. Making known to any person or organization written or spoken material that violates an individual's right of privacy. Unauthorized taking or use of any advertising idea, material, slogan, style or title of others."

The provision governing the "[r]ight and duty to defend" provided: "We'll have the right and duty to defend any claim or suit for covered injury or damage made or brought against any protected person. We'll do so even if any of the allegations of any such claim or suit are groundless, false or fraudulent. But we have no duty to perform other acts or services. And our duty to defend claims or suits ends when we have used up the limits of coverage that apply with the payment of judgments, settlements or medical expenses. [¶] We'll have the right to investigate any claim or suit to the extent that we believe is proper. We'll also have the right to settle any claim or suit within the available limits of coverage."

The Hurvitz/Hoefflin Litigation

Appellant Dr. Hurvitz was formerly in business with Dr. Steven Hoefflin. In 1996, Dr. Hurvitz filed suit against Dr. Hoefflin, case No. SC043313 (No. 313). While that case was pending, four former employees of Dr. Hoefflin threatened to bring a sexual harassment claim against him. Dr. Hoefflin was convinced to settle immediately, and, although no complaint was supposed to be filed, one accidentally was. In addition, a second, more detailed, version of the complaint (hereafter the draft complaint) found its way into the hands of Dr. Hurvitz, who sent it to Bob Woodward of the Washington Post. The Post published a story about the allegations of the draft complaint. The draft complaint contained allegations that Dr. Hoefflin had exposed or ridiculed patients while they were under anesthesia.

As a result of the publication of the allegations of the draft complaint, Dr. Hoefflin filed a complaint for defamation against the Hurvitzes, case No. SC049883 (No. 883). Dr. Hoefflin also filed a cross-complaint in No. 313, the case initiated by Dr. Hurvitz, containing similar allegations of defamation. Dr. Hoefflin then filed a cross-complaint in another action pending between him and the Hurvitzes, case No. SC051519 (No. 519). The defendants in No. 519 included the Hurvitzes and Gregory Smith, one of the attorneys for the employees who had threatened to sue Dr. Hoefflin. In addition to defamation, the cross-complaint in No. 519 alleged conspiracy, promissory fraud, fraud in the inducement, and breach of contract, based on the turnover of the draft complaint to the press.

Finally, Dr. Hoefflin filed yet another complaint against the Hurvitzes, case No. SC052602 (No. 602), this time including one of the settling employees, Kim Moore-Mestas, Smith, and another attorney for the employees, Richard Garrigues. With regard to the Hurvitzes, the complaint in No. 602 alleged that they encouraged Moore-Mestas to breach the confidentiality provision of the employees' settlement agreement. The complaint in No. 602 included defamation claims, but they were brought against Moore-Mestas and the attorneys only. The complaint also included a cause of action for "injunctive relief" seeking to keep all the defendants from "disseminating and discussing false allegations of misconduct by [Dr. Hoefflin] including but not limited to the allegations in the COMPLAINT, as well as the terms of the SETTLEMENT AGREEMENT with various persons, including the media." For reasons that are not entirely clear, this complaint was never served on the Hurvitzes.[1]

St. Paul's Representation and Settlement

On February 13, 1998, St. Paul agreed to represent the Hurvitzes in No. 883 (the first independent action for defamation filed by Dr. Hoefflin) under a reservation of

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[1] No. 313 and No. 883 were consolidated. The remaining cases, along with two others not involving the Hurvitzes, were deemed related and counsel was required to coordinate discovery.

rights. On September 8, 1998, St. Paul agreed to defend the Hurvitzes against the cross-complaint in No. 313, and the cross-complaint in No. 519. This was also subject to a reservation of rights.

On July 1, 1998, St. Paul declined to represent the Hurvitzes in the other independent lawsuit filed by Dr. Hoefflin, No. 602, on the ground that "[t]he only cause of action against the [Hurvitzes] is for intentional interference with contractual relationships and the final cause of action against all Defendants for injunctive relief"; "[t]he cause of action for interference with contractual relationship does not potentially allege bodily injury, property damage or an occurrence"; "[the claim does not] potentially allege any enumerated tort under the personal injury coverage . . . or any claims for advertising injury"; and "[a]ny potential claims for libel or slander that the facts might describe are being pursued by [Dr.] Hoefflin in a separate action [and] are not potentially alleged here."

The Hurvitzes were initially represented by independent counsel, Thomas M. Ferlauto, and his firm, King & Ferlauto, due to St. Paul's reservation of rights. St. Paul withdrew its reservation of rights on November 29, 1999, and proceeded to appoint Richard Charnley as new defense counsel for the Hurvitzes. The next month, St. Paul sent a letter to Ferlauto in which terms of settlement of both Dr. Hoefflins' claims against the Hurvitzes and the Hurvitzes' potential claims against St. Paul and Dr. Hoefflin were discussed, and the following statement was made: "If you would prefer for St. Paul not to settle the case, and would rather withdraw the tender of this claim for any defense by St. Paul, you, of course, have that right. Please advise us by the end of the day. As long as this case is being tendered to St. Paul and defended by St. Paul, St. Paul may exercise its right to settle the claims against its insured." In April 2000, Mrs. Hurvitz sent a letter stating that she wished to withdraw the tender of all lawsuits that St. Paul had been defending on her behalf.[2] Nevertheless, St. Paul proceeded to settle all of Dr. Hoefflin's

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[2] The matter was not actually settled until spring of the following year. In a letter dated April 14, 2000, counsel for St. Paul stated: "St. Paul cannot consider a policy buyback while [Dr.] Hoefflin's claims against the Hurvitzes are still pending. If the

claims against it and the Hurvitzes, including the claims against Mrs. Hurvitz and the claims in No. 602, the action which St. Paul had consistently refused to defend.

Under the settlement agreement, Dr. Hoefflin agreed to release the Hurvitzes from all claims of any nature whatsoever and specifically agreed to dismiss all four complaints and cross-complaints against the Hurvitzes in exchange for $325,000. The settlement was conditioned on "the dismissal of Dr. Hoefflin's claims [being] effectuated by the court." Dr. Hoefflin agreed that the settlement was "not intended to impair [the Hurvitzes'] prosecution of any and all claims available to [them] against Dr. Hoefflin, and that the prosecution of any and all such claims is in no manner impacted, effected, modified, cancelled, settled, released or waived by way of the release or the dismissal entered pursuant to this settlement." At the hearing in which the settlement was put on the record, both Charnley and Ferluato appeared on behalf of the Hurvitzes to clarify that this was a settlement between Dr. Hoefflin and St. Paul, and that the Hurvitzes objected. The court dismissed Dr. Hoefflin's complaints and cross-complaints against the Hurvitzes in No. 883, No. 313, No. 519, and No. 602.

Counsel for the Hurvitzes also appeared at the hearing challenging whether the settlement between St. Paul and Dr. Hoefflin was in good faith for purposes of Code of Civil Procedure section 877.6.[3] The challenge was brought by the codefendants in No. 602 -- More-Mestas and the attorneys who had represented her in the sexual harassment lawsuit -- to protect their potential right to proceed against the Hurvitzes for indemnity. The challenging parties argued that since St. Paul expressly denied coverage to the Hurvitzes for claims asserted in No. 602, it had no standing to obtain a good faith determination in that case. Counsel for the Hurvitzes informed the court at that time that

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Hurvitzes wish to waive all policy rights by withdrawing tender of [Dr.] Hoefflin's claims, they may do so at any time before finalization of a settlement, by an instrument in writing delivered to this office. However, . . . I don't think withdrawing the tender would necessarily prevent St. Paul from settling the case because St. Paul could still be liable in a direct action after a judgment."

[3] The transcript of the hearing appears in the record of a related appeal between the parties: *Hurvitz v. St. Paul Marine and Fire Insurance Co*., case No. B158904.

the Hurvitzes "would like the protection of a good faith determination." Counsel argued, however, that the good faith determination could and should wait until a later time due to his concern that such a determination would impact the Hurvitzes ability to pursue the underlying lawsuit against St. Paul for wrongfully settling without their consent.

The Underlying Complaint and Summary Judgment

After the settlement agreement was finalized, the Hurvitzes filed the underlying complaint against St. Paul. The complaint contained two causes of action -- one for breach of the insurance policy, including breach of the implied covenant of good faith and fair dealing, and one for breach of an alleged oral settlement agreement. With respect to the action for breach of the insurance policy, the complaint alleged that St. Paul "prematurely abandoned prospects of a global settlement which would have been beneficial to the [Hurvitzes] in favor of pursing a partial settlement which was favorable to [St. Paul] and not favorable to the [Hurvitzes]." The complaint further alleged that St. Paul attempted to coerce the Hurvitzes into accepting the settlement by refusing to pay invoices of their independent defense counsel. St. Paul's settlement with Dr. Hoefflin allegedly: impaired the Hurvitzes negotiating position; caused injury to their reputation; precluded them from filing a malicious prosecution action against Dr. Hoefflin; provided funds to Dr. Hoefflin to use to finance his defense of the Hurvitzes' lawsuits against him; deprived the Hurvitzes of insurance financing for their continued litigation; and impacted the Hurvitzes' future insurability.

The complaint also alleged breach of a binding settlement agreement with the Hurvitzes. According to the allegations, an oral contract was entered into on or about January 7, 2000, under which St. Paul was to pay the Hurvitzes $80,000 in return for the release of their malicious prosecution claims against Dr. Hoefflin and release of their right to seek reimbursement for defense costs from St. Paul.

St. Paul moved for summary judgment. The moving papers established that the policy gave St. Paul the right to settle claims against the insureds without their consent,

that St. Paul settled all of Dr. Hoefflin's claims against the Hurvitzes, and that the settlement did not impair the Hurvitzes' affirmative cross-claims against Dr. Hoefflin.[4]

In the opposition, the Hurvitzes disputed that St. Paul had the right to settle No. 602 because of its denial of tender, or any of the claims against Mrs. Hurvitz. They further contended that settling with Dr. Hoefflin without their consent violated the covenant of good faith and fair dealing because, among other things, it impaired their potential malicious prosecution claim and that they were entitled to independent counsel during settlement negotiations.

Trial Court's Order

The trial court granted the motion for summary judgment. The court reasoned that "[t]he policy expressly gave [St. Paul] the right to settle claims within the policy limits and to do so without the consent of the insured" and that therefore "[the Hurvitzes'] dissatisfaction with the terms of the settlement does not give rise to a claim." St. Paul was under no obligation "to litigate every case to a favorable termination to preserve the insured's expectancy of a future claim for malicious prosecution." Concerning Mrs. Hurvitz's attempt to withdraw her tender of defense, the court said that it did not "result in the requirement that [St. Paul] obtain [her] consent to settle" because "[t]here is no evidence that [Mrs.] Hurvitz withdrew her demand that St. Paul indemnify her" and that therefore "St. Paul was contractually obligated to pay a settlement or judgment of [Dr.] Hoefflin's claim." The court also expressed the understanding that "[t]he withdrawal of [Mrs. Hurvitz's] tender of defense could not prevent [Dr.] Hoefflin from obtaining a judgment against her and then collecting that judgment from St. Paul. Once [Dr.] Hoefflin sued and St. Paul agreed to provide a defense, [Dr.] Hoefflin's rights against the St. Paul policy vested, so that St. Paul and the Hurvitzes could neither bilaterally nor unilaterally defeat [Dr.] Hoefflin's claims against the policy. Neither the

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[4] The moving and opposition papers included numerous facts pertinent to the Hurvitzes' second cause of action for breach of settlement agreement. Our discussion of those facts is set forth in part V, *infra*.

insurer nor the policyholder can cancel or rescind an insurance policy to defeat the rights of third party claimants."

With regard to the cause of action for breach of settlement agreement, the court stated: "The undisputed facts show that [St. Paul] did not agree to [the terms contained in the January 8, 2000, letter] and that the [Hurvitzes] themselves had no knowledge of and certainly did not agree to the settlement terms they are seeking to enforce. The letters presented by [the Hurvitzes] show that there was no 'meetings of the minds' regarding the terms of any oral contract. [¶] [The Hurvitzes have] presented no material disputed facts that would demonstrate that there was a meeting of the minds. Further, it was the clear intention of the parties that the agreement would be in writing before it could be considered completed." Judgment was entered on the court's order, and this appeal followed.

DISCUSSION

I

The Hurvitzes contend that St. Paul wrongfully settled with Dr. Hoefflin over their objection, particularly with regard to No. 602, the case it consistently refused to defend, and the claims asserted against Mrs. Hurvitz since she sent a letter purporting to withdraw her tender of defense.

Preliminarily, we look at whether an indemnitor's settlement of a lawsuit without the consent or participation of the indemnitee does, in fact, bar a later claim for malicious prosecution by the indemnitee -- the primary injury purportedly suffered by the Hurvitzes. That was the issue in *Villa v. Cole* (1992) 4 Cal.App.4th 1327, a case involving a suit against several Alameda police officers and the City of Alameda (City) brought by a man who had been arrested for drunk and disorderly conduct. The officers were sued both in their official capacities and their individual capacities, and were represented by the City's attorney. The City was bearing all the cost of defense and would have been obligated to pay any judgment. The arrestee eventually offered to settle in exchange for the City's waiver of its right to seek reimbursement for its litigation costs

and attorney fees. One of the officers objected to settlement on those terms, but the City went ahead, taking the position that it had a right to settle the lawsuit on behalf of the recalcitrant officer because it had borne all the expense of his indemnification and defense, and because the settlement would result in the dismissal of the lawsuit with no actual or potential liability to him. After the matter settled, the officer filed a lawsuit for malicious prosecution against the arrestee. Summary judgment was granted on the ground that the settlement prevented the officer from establishing favorable termination of the underlying action in his favor.

In reviewing the trial court's order, the appellate court discussed the basic principles of malicious prosecution law: "[I]n order to establish a cause of action for malicious prosecution a plaintiff must plead and prove that the prior proceeding . . . was: (1) pursued to a legal termination favorable to the plaintiff; (2) brought without probable cause; and (3) initiated with malice. [Citations.] . . . [¶] In order for the termination of the lawsuit to be considered 'favorable' to the malicious prosecution plaintiff, it must be reflective of the merits of the action and of the plaintiff's innocence of the misconduct alleged therein. In most cases, a voluntary unilateral dismissal is considered a termination in favor of the defendant in the underlying action; the same is true of a dismissal for failure to prosecute. [Citations.] [¶] On the other hand, a resolution of the underlying litigation that leaves some doubt as to the defendant's innocence or liability is *not* a favorable termination, and bars that party from bringing a malicious prosecution action against the underlying plaintiff. Thus, a dismissal resulting from negotiation, settlement or agreement is generally not deemed a favorable termination of the proceedings. [Citations.] The purpose of a settlement is to *avoid* a determination on the merits." (*Villa v. Cole, supra,* 4 Cal.App.4th at pp. 1335-1336.)

The officer contended that because the underlying lawsuit was settled over his protests and objection and because he did not participate in the settlement in any way, it "actually operated as a voluntary unilateral dismissal of himself by [the arrestee], and was thus a favorable termination on the merits." (*Villa v. Cole, supra,* 4 Cal.App.4th at p. 1336.) The court disagreed: "[E]ven where a defendant does not agree to a settlement

made on his behalf, his or her dismissal from the lawsuit pursuant to that settlement will not be viewed as a favorable termination as long as it was a necessary condition to achievement of the overall settlement. Such a dismissal is not considered unilateral because it was required by the terms of a settlement agreement, and it will act as a bar to a later malicious prosecution action by the nonsettling defendant." (*Ibid*.) In the case before it, "the terms of the settlement between the City and [the arrestee] required the dismissal of all the defendants, including [the officer]. The City could not realize the benefits of settling the litigation with [the arrestee] unless the action against [the officer] was simultaneously terminated. Otherwise, the City would continue to be exposed to potential liability on [the officer's] behalf, both for defense and for indemnification, and would therefore still be a participant in the litigation, contrary to its aims in settling with [the arrestee] and his attorney. In short, [the arrestee] dismissed [the officer] from the lawsuit because it was necessary to effect the settlement with the City. Such a termination does not necessarily reflect [the arrestee's] opinion that his action against [the officer] lacked merit, and thus does not qualify as a favorable termination for purposes of a malicious prosecution action." (*Ibid*.)

In reaching its decision, the court relied in part on *Haight v. Handweiler* (1988) 199 Cal.App.3d 85. In that case, a malicious prosecution action based on an underlying malicious prosecution action, the attorney defendant in the underlying malicious prosecution refused to settle unless the plaintiff also dismissed his former client. The settlement went forward and both were dismissed, but neither the client nor his new attorney agreed to the settlement or authorized the dismissal. Like the officer in *Villa v. Cole, supra*, 4 Cal.App.4th 1327, the client argued that "because he did not agree to the settlement the termination should be treated as a voluntary dismissal of him . . . ." (*Haight v. Handweiler, supra,* 199 Cal.App.3d at p. 89.) The facts were undisputed, however, that the plaintiff in the underlying malicious prosecution action "dismissed [the client] because it was necessary to effect the settlement, . . . because [the former attorney] would not settle without it . . . ." (*Ibid*.) The plaintiff in the underlying malicious prosecution action also believed that the settlement funds represented reasonable

compensation for the damage he suffered in the original litigation. On those facts, the court agreed that the dismissal of the client "does not qualify as a favorable termination in the context of a malicious prosecution action." (*Ibid*.)

Based on *Villa v. Cole* and *Haight v. Handweiler*, it appears that the Hurvitzes are correct that the settlement, despite their lack of involvement and outright opposition, deprived them of the favorable termination needed to pursue a later malicious prosecution action against Dr. Hoefflin.

II

As we have seen, the insurance policy gave St. Paul "the right and duty to defend any claim or suit for covered injury or damage made or brought against any protected person[] . . . even if any of the allegations of any such claim or suit are groundless, false or fraudulent" and "the right to settle any claim or suit within the available limits of coverage." The Hurvitzes argue that, despite the language of the policy, St. Paul did not have an unfettered right to settle claims without their consent. The Hurvitzes maintain that by settling, St. Paul violated the covenant of good faith and fair dealing because Dr. Hoefflin's claims were meritless, and the settlement precluded the possibility of a later claim for malicious prosecution action against Dr. Hoefflin. The Hurvitzes further alleged that the settlement impaired their negotiating position, caused injury to their reputation, provided funds to Dr. Hoefflin to use to finance his defense of the Hurvitzes' lawsuits against him, deprived the Hurvitzes of insurance financing for their continued litigation, and impacted their future insurability.

Similar allegations were before the court in *Western Polymer Technology, Inc. v. Reliance Ins. Co.* (1995) 32 Cal.App.4th 14, where the plaintiffs, a company and its owner, alleged that the settlement of a third party claim by their insurer "injured their reputations and damaged [plaintiff company's] ability to recover on its cross-complaint against the third parties." (*Id*. at p. 18.) The plaintiff company had been sued by a third party for allegedly delivering defective manufacturing equipment, and had cross-claimed for amounts due under a note and for misrepresentation. After expending over $500,000

in defense costs, the insurer settled within policy limits under an agreement that left the cross-claims intact. Putting a reverse spin on the numerous cases which have held that an insurer acts in bad faith when it unreasonably *refuses* to settle a case within policy limits and thus exposes its insured to a judgment far beyond policy limits, the plaintiffs argued that an insurer engages in bad faith conduct when it *accepts* a settlement over the insured's objection where there is no likelihood that the insured would be exposed to a judgment that exceeded the policy's limits. (*Id*. at p. 23.)

The court refused to "accept [plaintiffs'] indiscriminate transfer of rules that address one problem -- insurers which wrongfully expose their insureds to excess liability by unreasonably refusing settlements -- to a context completely foreign to the rules' origins." (*Western Polymer Technology, Inc. v. Reliance Ins. Co., supra,* 32 Cal.App.4th at p. 23.) Instead, it "use[d] fundamental principles that govern claimed breaches of the implied covenant of good faith and fair dealing" to analyze plaintiffs' claim. (*Ibid*.) Under this analysis, it was clear that the interests plaintiffs claimed were impaired could not be protected by the implied covenant of good faith and fair dealing, given the purpose of liability insurance and the express language of the policy: "[Plaintiff company] contends that the settlement injured its business reputation. However, a liability insurance policy's purpose is to provide the insured with a defense and indemnification for third party claims within the scope of the coverage purchased, and not to insure the entire range of the insured's well-being. [Citation.] At least where the policy does not require the insured's consent to a settlement, there appears to be no precedent for holding an insurer liable for injury to an insured's reputation as a result of the settlement of a third party claim. [Citation.] This is not surprising, because the policy language informs the insured that the insurer may settle 'as it deems expedient' any claim or suit, even if the suit's allegations are 'groundless, false or fraudulent . . . .' No reasonable reading of this language would create an expectation that the insurer has to forgo settlement in favor of vindicating the insured's reputation." (*Id*. at p. 27.) As the court saw it, adopting the plaintiffs' argument would mean that insurers could never settle without the insured's consent even where the contract stated otherwise, and result in "a judicial fiat excising

insurers' contractual right to control settlements . . . ." (*Id*. at p. 28; accord, *New Hampshire Ins. Co. v. Ridout Roofing Co.* (1988) 68 Cal.App.4th 495, 504, 505 [stating that where the policy "gave the insurer the express right to settle claims and, if such settlements included the insured's deductible, to thereafter seek reimbursement from the insured," the insured's exercise of that right could not be limited by the implied covenant of good faith and fair dealing because "the implied covenant cannot be utilized to limit or restrict an express grant of discretion in a contract to one of the parties thereto"]; see *Caplan v. Fellheimer Eichen Braverman & Kaskey* (3d Cir. 1995) 68 F.3d 828, 839 [where insured sought an injunction to prevent the insurer from settling with a third party because the settlement would preclude a later malicious prosecution action, court held that because they contracted with the insurer to authorize it to settle claim and thereby "acted to permit the outcome which they find unacceptable," the outcome complained of was "self-inflicted" and "does not qualify as irreparable [injury]"].)

Although the Hurvitzes' alleged injuries are somewhat different than those described in *Western Polymer*, we believe the court's analysis is equally applicable here.[5] The decision to settle rather than continue litigation invariably involves a conflict between the desire to vindicate oneself, and the desire to minimize the costs of litigation and avoid the risk of loss. Defendants who settle face an uphill battle in convincing others, including members of the interested public or the media, that they were completely innocent of the charges. Moreover, when a defendant pays money or gives up something of value to settle a claim, he or she loses the ability to later pursue a malicious prosecution claim. (See, e.g., *Ferreira v. Gray, Cary, Ware & Freidenrich* (2001) 87 Cal.App.4th 409, 414 ["a negotiated settlement . . . is entirely inconsistent with bringing a further lawsuit for malicious prosecution"].) These are the ordinary consequences of settlement. A party purchasing a liability insurance policy containing the duty to defend

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[5] Plaintiffs in *Western Polymer* claimed that there was an impact on future insurability and that the settlement created a war chest for the third party, but the court did not believe those factors were properly before it. (32 Cal.App.4th at p. 27, fns. 8 & 9.) The Hurvitzes included these types of allegations in their complaint.

language at issue here agrees to accept the insurer's view concerning the point at which the benefits of settlement exceed the risk of continuing litigation. The alternative is to negotiate -- and pay for -- a policy with a consent provision. Liability insurance exists primarily to protect the insured's finances. The covenant of good faith and fair dealing requires the insurer to minimize the possibility of an award that exceeds the policy's limits -- it does not require the insurer to fight a legal action until the bitter end when the costs of defense exceed the benefit to be achieved.

We find further support for our conclusion in *New Plumbing Contractors, Inc. v. Edwards, Sooy & Byron* (2002) 99 Cal.App.4th 799, where the insured sued not its insurer, but the insurer's counsel, alleging professional negligence and breach of fiduciary duty for settling an earlier action without notifying the insured and "ignoring valid defenses that would have absolved [the insured] of any liability." (*Id*. at p. 801.) The damages were said to be "higher premiums, . . . lower coverage and higher deductibles," as well as the need to deal with "financially weaker carriers . . . ." (*Ibid*.) The trial court ruled that "the insurer had the right to settle the case regardless of whether it was defensible, and without consulting its insured." (*Id*. at pp. 801-802.) The appellate court agreed: "Under a policy provision giving an insurance company discretion to settle as it sees fit, the insurer is 'entitled to control settlement negotiations without interference from the insured,' and generally, it has no liability to the insured for settling within the policy limits. [Citation.] Thus, there is no cause of action where the insured claims the settlement injured its business reputation [citation], nor any where the insured claims the settlement unfairly used up its deductibles. [Citation.] . . . [¶] Since [the insurer] could settle without consulting [the insured] and over its objection, counsel's recommendation of settlement was not a cause of any harm the [insured] may have suffered." (*Id*. at p. 802.)

The Hurvitzes cite a case with similar facts that came to a dissimilar conclusion: *Novak v. Low, Ball & Lynch* (1999) 77 Cal.App.4th 278. There the insurer agreed to defend two of the multiple causes of action in a third party complaint under a reservation of rights. Independent counsel was appointed to provide the insured a defense. In the

meantime, unbeknownst to the insured or his independent counsel, counsel for the insurer entered into settlement negotiations with the third party, eventually agreeing to settle the two potentially covered causes of action, allowing the insurer to completely withdraw. As in *New Plumbing Contractors*, the insured brought an action against the attorneys for the insurer, contending that they should have advised the insured and his counsel of settlement negotiations. The claim was dismissed by the trial court, but the Court of Appeal believed there was merit to the allegations because the insured and his attorney might have been able "to impact settlement through the exchange of information or otherwise . . . protect [the insured's] interest in light of the proposed dismissal of the first two causes of action." (*Id*. at p. 285.)

The court gave various examples of ways the insured could have acted to protect himself had he been properly informed, which "[bore] on the factual issues of causation and damages, which remain for determination at trial": "[He] could have attempted to finish discovery prior to settlement, effect a global settlement of the entire action or seek declaratory relief as to whether [the insurer] could withdraw its defense upon a partial settlement. [The insured] has also asserted various ways in which the settlement worked more harm than good, including loss of insurance protection and defense to the remaining causes of action. As well, the settlement provided [the third party] with financing to aggressively prosecute the remaining causes of action. Further, [the insured] contends the first two causes of action were completely devoid of merit, and thus their dismissal precluded pursuit of a suit for malicious prosecution as to those claims." (*Novak v. Low, Ball & Lynch, supra,* 77 Cal.App.4th at p. 285.)

In *Novak*, the harm to the insured arose primarily from the failure to negotiate a *global* settlement that included dismissal of all causes of action against the insured, something that did not occur here. However, to the extent it is supportive of the view that, prior to acceptance of a reasonable settlement within policy limits, an insurer or its counsel must consider the impact of a settlement on an insured's potential claim for malicious prosecution or on the third party's ability to finance continuing litigation, we

must respectfully disagree for the reasons we have discussed and the reasons set forth in *Western Polymer* and *New Plumbing Contractors*.

As the Hurvitzes further point out, in other circumstances, courts have held that settlements which eliminate the insureds' rights to obtain recovery for their affirmative claims of injury can result in liability for bad faith. In two cases -- *Barney v. Aetna Casualty & Surety Co.* (1986) 185 Cal.App.3d 966, and *Rothtrock v. Ohio Farmers Ins. Co.* (1965) 233 Cal.App.2d 616 -- both involving automobile accidents, the insurance companies' settlements with third parties caused the insureds' compulsory cross-claims for personal injuries arising out of the same accidents to be barred. In those cases, the insurers undertook the settlements knowing that the insureds intended to file cross-claims, but before the cross-claims were filed. Had they simply allowed the cross-claims to be filed before the settlement, or carefully worded the settlement agreements to make clear that cross-claims were not precluded -- as St. Paul did here with respect to the Hurvitzes' cross-claims against Dr. Hoefflin -- the claims could have gone forward. The Hurvitzes suggest no way that St. Paul could have both settled with Dr. Hoefflin and preserved their right to a malicious prosecution action. (See *Villa v. Cole, supra*, 4 Cal.App.4th 1327; *Ferreira v. Gray, Cary, Ware & Freidenrich, supra*, 87 Cal.App.4th at p. 413 ["[W]here both sides give up anything of value in order to end the litigation, a party cannot later claim he received a favorable termination"].)

The Hurvitzes also seek to rely on this court's decision in *Notrica v. State Comp. Ins. Fund* (1999) 70 Cal.App.4th 911 for the proposition that the insurer must at least consider the potential impact on the insured's future premiums when it settles a third party lawsuit. In that case, a business sued its workers' compensation carrier, the State Compensation Insurance Fund, for tort recovery based on the insurer's case reserve and claims handling policies and practices. The insurer had a pattern of leaving claims open for excessive periods of time and assigning high monetary reserves to account for their future resolution, thus causing the insured's experience based premiums to be inflated. We followed the decision in *Security Officers Service, Inc. v. State Compensation Ins. Fund* (1993) 17 Cal.App.4th 887, in holding that this practice violated the implied

covenant of good faith and fair dealing. In *Security Officers Service*, the plaintiff established that claims which had been open for as long as three years, and to which reserves in excess of $100,000 had been assigned, could have been easily resolved for a fraction of the reserve amount. (*Id*. at p. 891.) The insurer argued that a finding that the implied covenant applied in that situation would improperly conflict with its liability to claimants "because [it] would be forced to attune its efforts toward minimizing plaintiff's premiums, as opposed to proper claims determination and payment." (*Id*. at p. 898.) The court in *Security Officers Service* found this conflict to be "a false one" -- and we agreed -- because "[f]rom the standpoint of diligence and proper reserve-setting, the interests of both [the insured and the claimant] are identical." (*Ibid*.)

The situation here is not at all analogous to that in *Notrica* and *Security Officers Service*. Unlike the plaintiffs in those cases, the Hurvitzes did not seek to have the claims against them resolved quickly and efficiently, but urged that St. Paul litigate until the bitter end -- whatever the cost -- in order to maximize the future potential for a successful malicious prosecution claim against Dr. Hoefflin. To hold that the implied covenant requires an insurer to reject a settlement which represents in the Hurvitzes' own words "[an] amount. . . based merely on the cost of defense of the protracted litigation, not any legitimate evaluation of exposure," would create a conflict with the insurers' duty to resolve claims fairly and efficiently.

In the final analysis, the position the Hurvitzes advocate would put insurers in an untenable position. The law requires insurers to settle third party claims whenever they reasonably can, in order to avoid the potential of a judgment that exceeds policy limits. Failure to do so exposes insurers to bad faith tort damages. The Hurvitzes attempted to prevent St. Paul from settling with Dr. Hoefflin, but, notwithstanding their professed expectations of an easy victory, at no time indicated a willingness to give up their right to indemnity from St. Paul if Dr. Hoefflin won a judgment in excess of the proposed settlement. Nor did they agree to give up their right to seek a bad faith recovery against St. Paul if a judgment was obtained against them in excess of policy limits. A rule requiring an insurer to refuse a reasonable settlement merely because the insured hopes to

someday prevail in a malicious prosecution action would conflict with the insurer's duty to handle claims efficiently and pay reasonable settlement offers in order to protect the insured from financial ruin caused by an excessive judgment. We see no reason to create a new area of potential bad faith liability for insurers that conflicts with the insurer's well-established duty -- particularly since the rule advocated could easily backfire, resulting in more harm than good to the insured.

III

The Hurvitzes contend that St. Paul had no right to settle with Dr. Hoefflin on Mrs. Hurvitz's behalf after receipt of the letter withdrawing tender, or represent the couple in any way in No. 602 since it never accepted tender of defense of that case. With respect to No. 602, St. Paul rejected tender because the only claims against the Hurvitzes in that specific lawsuit were for interference with contractual relationships and injunctive relief.[6] As we have seen, however, when St. Paul settled with Dr. Hoefflin, it not only obtained a general release of all claims against the Hurvitzes, but also obtained an agreement to dismiss the Hurvitzes in No. 602. In addition, St. Paul sought and obtained a finding that there was a good faith settlement in No. 602 with respect to the claims against the Hurvitzes, shielding them from indemnity claims by codefendants.

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[6] Had Dr. Hoefflin not chosen to pursue his claims in such a disjointed and fractured manner, it is unlikely that St. Paul could have taken this tack since the rule is that in a "mixed" action, that is one in which some of the claims are at least potentially covered and the other are not, "the insurer has duty to defend the action in its entirety." (*Buss v. Superior Court* (1997) 16 Cal.4th 35, 48.) The insurer "cannot parse the claims, dividing those that are at least potentially covered from those that are not. To do so would be time consuming. It might also be futile: The 'plasticity of modern pleading' [citation] allows the transformation of claims that are at least potentially covered into claims that are not, and vice versa." (*Id*. at p. 49.) The inherent futility of an attempt to parse covered from noncovered claims can be seen here. Since Dr. Hoefflin's complaints were all based on the same general set of facts, they were deemed related and went forward as one in the trial court. St. Paul's refusal of tender resulted in no obvious benefit or savings to the company.

One difficulty with the Hurvitzes' attempt to isolate No. 602 as the basis for bad faith actions by St. Paul is that the complaint in that case was never served on them. Consequently, they suffered no appreciable damage as the result of St. Paul's refusal of tender. Moreover, since Dr. Hoefflin's claims against the Hurvitzes all arose out of the same general set of facts, we do not see how St. Paul could have effectively settled the other three lawsuits in a way that fulfilled their good faith obligation to fully protect the Hurvitzes without resolving No. 602. Even if No. 602 had not been specifically mentioned in the settlement agreement, the general release obtained would have ultimately required Dr. Hoefflin to dismiss the Hurvitzes from the case.

More significantly, in asserting St. Paul's "wrongful" settlement of No. 602 as a basis for the underlying bad faith lawsuit, the Hurvitzes overlook that they obtained substantial benefit from the settlement, including a determination under Code of Civil Procedure section 877.6 that the other codefendants in No. 602 could not pursue cross-claims for indemnity. At the section 877.6 hearing, the Hurvitzes did not join the other defendants in contending that St. Paul lacked standing. Instead, they admitted that they desired the protection afforded by the finding that a good faith settlement had been consummated on their behalf. Their objection was based solely on a desire to put off the good faith determination for fear that it would undermine the present bad faith action.

A similar attempt to disavow the burden of an inconvenient settlement while at the same time accept the benefits was before the court in *Villa v. Cole, supra*, 4 Cal.App.4th 1327. The plaintiff police officer, in seeking to pursue a malicious prosecution action against the arrestee despite the City's purported settlement of the entire underlying action, asserted that "the City could not settle on his behalf and could not claim to represent him because he never requested such representation." (*Id*. at p. 1336.) The court found the contention to be "without merit" explaining: "A party may not voluntarily accept the benefits of a settlement negotiated and accepted on the party's behalf by an attorney, and at the same time disavow the settlement to the extent it is against his or her perceived interests. [Citations.] [¶] Here, [the officer] accepted all the benefits of the City's representation of him, and of the settlement that terminated the

lawsuit against him. He did not express any objection to the fact that the City had assumed all the costs of his defense; he did not offer to reimburse the City for his pro rata share of litigation expenses; and he never offered to hold the City harmless for the costs he would incur in continuing to defend the lawsuit on his own. In short, while accepting the benefits of his dismissal, [the officer] did nothing to set aside or repudiate the settlement of which that dismissal was a part. On this basis, the City clearly could not assume that [the officer] would forego later claiming the right to reimbursement and indemnification from the City for any attorney fees, litigation costs, or damages he incurred in further defense of [the arrestee's] action. In order to protect itself against further litigation, the City was entitled to provide for [the officer's] representation and also to require his dismissal as part of the overall settlement. [The officer] may not now disavow that settlement, having effectively ratified it by accepting its benefits." (*Id*. at p. 1337.)

The situation was somewhat the same in *New Hampshire Ins. Co. v. Ridout Roofing Co., supra,* 68 Cal.App.4th 495, where the insured tendered defense of multiple claims to its insurer and allowed the insurer to pay all the expenses of the litigation, but balked at paying the policy's deductible of $5,000 per occurrence after the claims were settled. In a lawsuit brought by the insurer to recover reimbursement for the deductible, the insured argued, among other things, that the losses were not covered "property damage" losses under the policy. (*Id*. at p. 501.) The court stated: "If, subsequent to its tenders to the insurer and the commencement of the latter's provision of a defense, this insured concluded that, notwithstanding its tender(s), some or all of these claims were in fact not covered by the policy, it could have, among other things (1) so stated via a letter to the insurer and requested the transfer of the defense to its own counsel, (2) so stated in court and requested a substitution of counsel on that basis, (3) filed a declaratory relief action asking for a determination that there was no coverage, etc. What it cannot do, however, is have the best of both worlds, i.e., accept the benefits of the defense provided by the insurer but, when the time comes to effect settlements of the claims (via, in part, its deductibles), then assert a lack of coverage." (*Id*. at p. 507.)

The Hurvitzes likewise seek to have it both ways with regards to No. 602. To the extent any defense in No. 602 was required, it was funded by St. Paul. The Hurvitzes were more than happy to accept St. Paul's defense funds prior to the settlement as well as the settlement's protection from indemnity cross-claims, but now condemn St. Paul for settling in order to support a bad faith suit. This cannot be countenanced. Having been brought into the Dr. Hoefflin litigation by the Hurvitzes and having provided the defense that they demanded, St. Paul had a right to settle in a way that protected both it and the Hurvitzes from future litigation, and did not engage in bad faith by making the settlement contingent on dismissal of all claims against the Hurvitzes -- including a claim it had previously refused to defend.

The principal distinction between the present case and the situation in *Villa* and *New Hampshire* is that, here, Mrs. Hurvitz attempted to formally withdraw her tender of defense by sending a letter to St. Paul which stated that she "wish[ed] to withdraw [her] tender of all lawsuits that St. Paul has been defending [her] against." In seeking to withdraw her tender of defense, however, Mrs. Hurvitz did not state that she would personally finance her share of all future litigation costs without expectation of reimbursement or hold St. Paul harmless for any recovery obtained from her by Dr. Hoefflin. Instead, a major stumbling block precluding the consummation of a three-way settlement was the Hurvitzes' unwillingness to provide an unequivocal policyholder's release to St. Paul. At the time Mrs. Hurvitz was purportedly withdrawing her tender, the Hurvitzes were seeking to negotiate through their counsel either (1) a limited release of claims they might have against St. Paul as a result of St. Paul's handling of the Dr. Hoefflin matters in exchange for a payment of $80,000 or (2) a "buy back" proposal, under which the Hurvitzes would agree to give up all claims against St. Paul under the policy in exchange for a payment of $400,000. Mrs. Hurvitz's attempt to retain her right to sue St. Paul for bad faith breach

of contract rendered the purported withdrawal of tender ineffectual. St. Paul had no obligation to refrain from consummating the settlement with Dr. Hoefflin.[7]

IV

The Hurvitzes contend that St. Paul should have appointed independent counsel to represent them during settlement negotiations despite its withdrawal of the reservation of rights.

In the landmark case of *San Diego Federal Credit Union v. Cumis Ins. Society, Inc*. (1984) 162 Cal.App.3d 358, the court held that "where there are divergent interests of the insured and the insurer brought about by the insurer's reservation of rights based on possible noncoverage under the insurance policy, the insurer must pay the reasonable cost for hiring independent counsel by the insured."[8] (*Id*. at p. 375.) As the court explained: "In the usual tripartite relationship existing between insurer, insured and counsel, there is a single, common interest shared among them. Dual representation by counsel is beneficial since the shared goal of minimizing or eliminating liability to a third party is the same. A different situation is presented, however, when some or all of the allegations in the complaint do not fall within the scope of coverage under the policy. In

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[7] Because we conclude that Mrs. Hurvitz's attempt to withdraw tender was ineffectual, we need not consider whether Dr. Hoefflin had a vested right as a third-party claimant that could not be eliminated or altered by agreement between St. Paul and the Hurvitzes. (See *Shapiro v. Republic Indem. Co. of America* (1959) 52 Cal.2d 437, 438-440 [injured person not bound by lawsuit between insurer and insured leading to reformation of insurance policy since he was not a party].)

[8] The holding of the case was codified by the Legislature in Civil Code section 2860 which provides that "[i]f the provisions of a policy of insurance impose a duty to defend upon an insurer and a conflict of interest arises which creates a duty on the part of the insurer to provide independent counsel to the insured, the insurer shall provide independent counsel to represent the insured" and that "when an insurer reserves its rights on a given issue and the outcome of that coverage issue can be controlled by counsel first retained by the insurer for the defense of the claim, a conflict of interest may exist." (Civ. Code, § 2860, subds. (a), (b).)

such a case, the standard practice of an insurer is to defend under a reservation of rights where the insurer promises to defend but states it may not indemnify the insured if liability is found. In this situation, there may be little commonality of interest. Opposing poles of interest are represented on the one hand in the insurer's desire to establish in the third party suit the insured's 'liability rested on intentional conduct' [citation], and thus no coverage under the policy, and on the other hand in the insured's desire to 'obtain a ruling . . . such liability emanated from the nonintentional conduct with his insurance coverage' [citation]. Although issues of coverage under the policy are not actually litigated in the third party suit, this does not detract from the force of these opposing interests as they operate on the attorney selected by the insurer, who has a dual agency status [citation]." (*Id*. at pp. 364-365, fns. omitted.) Since St. Paul decided to withdraw its reservation of rights prior to settlement, cases involving appointment of independent counsel due to a conflict arising out of a reservation of rights have no applicability here.

Courts have held that there are occasions other than where the insurer defends covered and uncovered claims under a reservation of rights when independent counsel is required.[9] We do not believe the situation before us is one of them. In a case involving settlement, *Golden Eagle Ins. Co. v. Foremost Ins. Co.* (1993) 20 Cal.App.4th 1372, the court concluded that independent counsel was required where the insurer proposed to settle a case in an amount that exceeded policy limits because "counsel [was] put in the position of representing clients with conflicting positions regarding settlement" and "one set of clients -- the insurers -- was seeking to settle the case with the other clients'

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[9] See Croskey et al., Cal. Practice Guide: Insurance Litigation (The Rutter Group 2002) paragraphs 7:771.1 to 7:771.4, page 7B-64.11, describing the various circumstances that may create a conflict of interest for insurance defense counsel to include situations where: "The insurer insures several insureds who have conflicting claims against each other"; "[t]he insurer has employed a single defense counsel to represent several insureds whose interests differ"; "[t]he insurer has commenced litigation against the insured, whether or not related to the lawsuit it is obligated to defend"; and "[t]he same attorney employed to defend the insured in the underlying action is representing the insurer in a separate declaratory relief action seeking to avoid coverage[.]"

money." (*Id*. at p. 1396.) This is not the case here where the lawsuits were settled well within policy limits.

Instead, we believe the present situation to be closer to that in *James 3 Corp. v. Truck Ins. Exchange* (2001) 91 Cal.App.4th 1093. In *James 3*, the insured contended they had a right to independent counsel because "the attorney retained by [the insurer] 'refuse[ed] to pursue the affirmative defenses of trademark misuse and violation of the antitrust laws, solely to serve the financial interests of [the insurer], [thereby] render[ing] him substantially 'less effective' in defending the Insureds.'" (*Id*. at pp. 1102-1103, italics omitted.) The court concluded that independent counsel was not required because "the interests of the insureds and [the insurer] do not conflict vis-à-vis defense of the . . . causes of action in [plaintiff's] complaint. It is in the interest of both to be found not liable or, if found liable, to minimize damages." (*Id*. at p. 1103.) "[The insurer's] decision not to pursue the antitrust affirmative defense will not expose the insureds to claims by third parties, nor has [the insurer] attempted to settle the case using the insureds' money. [The insurer's] representation of the insureds is not 'less effective' because its appointed counsel also represents [the insurer], as [the insurer] is contractually obligated to indemnify the insureds for any damages awarded in the [plaintiff] action based on trademark infringement, unfair competition and related causes of action." (*Id*. at p. 1104.)

By the same token, St. Paul's decision here to settle over the Hurvitzes' objections does not represent a conflict of interest because St. Paul was obligated to pay the entire settlement amount. Thus, its interest in disputing liability and minimizing damages was aligned with the Hurvitzes. The fact that St. Paul chose to settle and thereby eliminate a potential later affirmative claim for malicious prosecution against Dr. Hoefflin does not mean that a conflict existed with respect to covered claims. It was the risk the Hurvitzes voluntarily undertook by turning over the defense of the matter to St. Paul under a policy which allowed the insurance company to handle litigation defense and settlement as it saw fit.

V

We now turn to the question of whether there was a breach of a binding settlement agreement to pay the Hurvitzes compensation.

A

The evidence presented in support of and opposition to summary judgment shows that on December 14, 1999, Charnley forwarded to Ferlauto a proposed settlement offer from Dr. Hoefflin's counsel. Under the proposal, the Hurvitzes and St. Paul were to "waive and release any claims for damages (including without limitation costs, attorneys' fees, and any other damage) arising out of the filing or prosecution of the proceedings . . . ." Ferlauto sent a response which indicated that the Hurvitzes would agree to settle if Dr. Hoefflin agreed to pay them $50,000 "in consideration for the release of the malicious prosecution claims as set forth in [the previous] letter." The Ferlauto letter also asked that St. Paul agree to renew the general liability policy for the same premium for three years, to pay King & Ferlauto for all costs and attorney fees then outstanding up to the time the settlement became final, and to waive any claim for reimbursement for defense costs from the Hurvitzes.

St. Paul sent a response agreeing that the St. Paul/Dr. Hoefflin settlement would include a confidentiality agreement, that St. Paul would pay the Hurvitzes $50,000 for release of any malicious prosecution claim, that St. Paul would agree to pay King & Ferlauto for all outstanding costs and attorneys fees at the rate of $140 per hour up to the date that Charnley substituted in as defense counsel, and to waive its right to seek reimbursement from the Hurvitzes for defense costs. The letter contained the additional condition that "[t]he Hurvitzes agree to a policy holders release for any and all claims that they believe they may have against St. Paul for handling of the above-referenced action." Ferlauto responded with a letter that sought an agreement to pay King & Ferlauto for all costs and attorney fees up to the time the proposed settlement became final.

On December 22, 1999, Ferlauto sent a letter to Charnley and Dr. Hoefflin's counsel stating his "understanding of the terms that will be included in the proposed settlement with Hoefflin[.]" The letter expressed Ferlauto's understanding that Dr. Hoefflin would dismiss all affirmative claims asserted against the Hurtvitzes, that the Hurvitzes would retain the right to pursue their current affirmative claims, and the terms of the settlement would be "strictly confidential." Also on December 22, 1999, Ferlauto sent a letter to the above counsel plus St. Paul's counsel "to confirm the tentative agreement between St. Paul and the Hurvitzes . . . ." The letter stated that the settlement agreement would "include" the following terms: (1) St. Paul was to pay the Hurvitzes $50,000 for release of the malicious prosecution claim; (2) St. Paul would pay King & Ferlauto at the rate of $140 per hour up to the November invoice and $5,000 for services performed in December; (3) St. Paul would waive its right to seek reimbursement for defense costs; (4) the Hurvitzes would sign a policyholder release for claim that they might have had against St. Paul "as a result of St. Paul's handling of the [Dr. Hoefflin matters]"; and (5) King & Ferlauto would have the right to initiate arbitration to obtain payment of invoices at a higher rate.[10] The letter stated: "Obviously, the above terms are conditioned on [Dr.] Hoefflin's agreement to the terms as set forth in [the above] letter [to Charnley and Dr. Hoefflin's counsel] dated December 22, 1999."

On January 4, 2000, Ferlauto sent another letter to all three counsel expressing concern about the fact that Dr. Hoefflin had not agreed to keep the settlement confidential. On the same date, Ferlauto sent a letter to counsel for Dr. Hoefflin and St. Paul "to propose additional terms between the Hurvitzes, St. Paul and [Dr.] Hoefflin in an attempt to salvage the current proposed settlement in light of the fact that [Dr.] Hoefflin has refused to keep the terms of the settlement strictly confidential, and has, in fact, expressed an intention to issue a press release concerning the settlement."

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[10] Civil Code section 2860 provides that any dispute concerning fees payable to independent counsel not resolved by reference to the statute "shall be resolved by final and binding arbitration by a single neutral arbitrator selected by the parties to the dispute." (Civ. Code, § 2860, subd. (c).)

The letter proposed that the parties be limited to one press release each, that St. Paul pay the Hurvitzes an additional $50,000, and that St. Paul assist the Hurvitzes with publicity and media coverage. In a letter dated January 5, Ferlauto proposed that St. Paul pay the Hurvitzes an additional $75,000 to compensate for the lack of a confidentiality agreement in the Dr. Hoefflin/St. Paul settlement.

On January 18, 2000, Ferlauto sent a letter stating that "St. Paul and the Hurvitzes recently reached a verbal conditional settlement agreement." According to the letter, the Hurvitzes agreed to consent to a settlement with Dr. Hoefflin on terms that did not require confidentiality. Their consent was "conditioned on the following settlement between St. Paul and the Hurvitzes[.]" There followed a description of settlement terms that included essentially the same terms as in the letter of December 22, 1999, except that St. Paul was to agree to pay the Hurvitzes $80,000. The letter concluded: "Please confirm that these are, in fact, the terms of the settlement between the Hurvitzes and St. Paul." Sometime later, St. Paul presented Ferlauto with a draft settlement agreement. Ferlauto made a number of changes in the language, including changing the language of the release provision and adding a provision to protect the rights "under the St. Paul policies" of the employees who originally sued Dr. Hoefflin.

On February 2, 2000, St. Paul sent Ferlauto a revised draft along with a letter from counsel that stated: "I take issue with your statement that the settlement agreement was contrary to the agreement we reached. . . . [I]t was clearly discussed that not only did St. Paul desire and expect a 1542 release, but also a policy holder release. . . . Your attempted revisions seem to imply that there is some circumstance that could hook St. Paul back into this action." Ferlauto's letter in response stated: "The reason behind the majority of the revisions that were made to your first draft, and the problem that I still have with your second draft, is that the release provided to St. Paul by the Hurvitzes is broader than the release that St. Paul is obtaining from [Dr.] Hoefflin for the benefit of the Hurvitzes. For example, the proposed settlement with Dr. Hoefflin only provides the Hurvitzes with a release of all claims asserted in the lawsuits or which could have been asserted in the lawsuits. . . . Consequently, it has always been my understanding of the

agreement that St. Paul would only be released from its coverage obligations by the Hurvitzes for the claims for which St. Paul obtained a release for the Hurvitzes. To that extent the language of the two agreement[s] should mirror each other. . . . St. Paul has never offered to compensate the Hurvitzes for the risk inherent in providing St. Paul with a complete policyholders' release in a situation where all possible claims under the policy have not been released." To prove his point, Ferlauto pointed to the language of his December 22, 1999, letter.

On February 3, 2000, Ferlauto sent a letter stating: "I have had an opportunity to discuss with my clients the unilateral changes to the agreement that St. Paul is insisting upon. The risks, from my clients' standpoint, of accepting an agreement under those terms are unacceptable. It is our position that a binding agreement was reached in early January. Consequently, the Hurvitzes are willing to execute settlement documentation consistent with that agreement." St. Paul's counsel responded: "I have advised St. Paul of your changes to the settlement agreement. As you know, the changes were material and such changes constitute a counter proposal. St. Paul, having already made significant concessions in the last draft/settlement proposal is now rejecting your proposal." On February 17, 2000, Ferlauto protested that he had not added additional terms. "The term in question concerns the allocation of the $80,000 paid to the Hurvitzes. St. Paul now wishes to allocate this amount to 'indemnity' so that this amount counts against the Hurvitzes' policy limits. Never has such an allocation ever been discussed." (Italics omitted.)

On February 22, 2000, Ferlauto responded to a letter from St. Paul's counsel describing the position taken by St. Paul that there was never an agreement between it and the Hurvitzes as "shocking." Counsel for St. Paul responded: "There is no agreement between the Hurvitzes and St. Paul nor, given the course of your demands does St. Paul expect there will . . . ever be one." As an example of additional demands added by Ferlauto, the letter pointed to the term concerning the former employees. In a followup letter, Ferlauto insisted "an agreement was reached, and the Hurvitzes expect

St. Paul to live up to its side of the bargain. The condition of an acceptable agreement with [Dr.] Hoefflin has apparently been satisfied."

On March 13, 2000, counsel for St. Paul sent a letter to Furlauto detailing why he believed the terms included in the draft settlement agreements prepared by St. Paul were not new. There followed a series of letters discussing a proposal under which St. Paul would buy back the policy and leave the Hurvitzes with the risks of continued litigation against Dr. Hoefflin. The Hurvitzes offered to do this for $400,000. Counsel for St. Paul expressed concern that Dr. Hoefflin may have had independent vested rights to pursue St. Paul due to his alleged status as an injured third party under the policy. As we have seen, St. Paul went forward with the settlement with Dr. Hoefflin without the Hurvitzes participation.

As we have also seen, the trial court granted summary judgment on the cause of action for breach of settlement agreement, stating in its order: "The letters presented by [the Hurvitzes] show that there was no 'meetings of the minds' regarding the terms of any oral contract. [¶] . . . Further, it was the clear intention of the parties that the agreement would be in writing before it could be considered completed."

B

The Hurvitzes cite *Harris v. Rudin, Richman & Appel* (1999) 74 Cal.App.4th 299, for the proposition that a settlement agreement need not be finalized in a formal document to be enforceable. In *Harris*, the appellate court reversed a trial court order sustaining a demurrer to a claim for breach of settlement contract where the agreement was contained in a letter from counsel which contained language indicating that "'draft . . . settlement documents'" were to follow. (*Id*. at p. 303.) Before documents could be prepared, one party learned of a change in the law that apparently nullified its liability and unilaterally took the "settlement arrangement" off the table. (*Ibid*.) The court held that the issue of "[w]hether the parties intended their communications to be a binding settlement agreement or an agreement to further negotiate after a formal draft was prepared [was] a factual question not properly the subject of a demurrer." (*Id*. at p. 308.)

The Hurvitzes overlook a crucial difference between the facts in *Harris* and those in the present matter: in *Harris*, the letter setting forth the essential terms of the settlement was written by *the defendants' counsel* and signed by *the defendants* under the notation "'[a]ccepted and agreed.'" (*Harris v. Rudin, Richman & Appel, supra,* 74 Cal.App.4th at p. 303.) In addition, there was no further correspondence between the parties until the defendants attempted to renege based on the change in the law. Here, the Hurvitzes seek to enforce a purported oral agreement based on a letter prepared wholly by *their own counsel*. The letter itself stated that the terms reflected his understanding and needed to be confirmed by St. Paul's counsel. No confirmation was sent. Instead, St. Paul wrote a draft containing terms that Ferlauto believed were new and different. The back and forth correspondence that followed showed a lack of agreement on a key feature -- the scope of the release to be obtained by St. Paul -- as well as other important provisions, such as the allocation of the $80,000 payment and the treatment of the former employees' potential claims.

"'"'Whether a writing constitutes a final agreement or merely an agreement to make an agreement depends primarily upon the intention of the parties[] [to] be determined by a construction of the instrument taken as a whole.'" (*Beck v. American Health Group Internat., Inc.* (1989) 211 Cal.App.3d 1555, 1562 . . . .) 'The objective intent as evidenced by the words of the instrument, not the parties' subjective intent, governs our interpretation.' (*Ibid*.) [¶] Where the writing at issue shows 'no more than an intent to further reduce the informal writing to a more formal one' the failure to follow it with a more formal writing does not negate the existence of the prior contract. [Citation.] However, where the writing shows it was not intended to be binding until a formal written contract is executed, there is no contract." (*Harris v. Rudin, Richman & Appel, supra*, 74 Cal.App.4th at p. 307.)

Here the trial court reviewed the facts, including the letter itself and the correspondence leading up to and following it and concluded that there was no binding agreement. We see no basis to disagree with that sound conclusion.

VI

Finally, the Hurvitzes contend that St. Paul breached its policy and duty to defend by failing to pay their counsel King & Ferlauto during the period between November 29, 1999, when St. Paul withdrew its reservation of rights, and March 22, 2000, when Richard Charnley, counsel selected by St. Paul, formally substituted in as counsel of record. They state in their brief that "the trial court simply ignored this claim by [the Hurvitzes]" and that "[t]he motion [for summary judgment] was granted without the trial court even offering an explanation [for] why [it] was granting judgment as a matter of law to St. Paul, when St. Paul was obviously in breach of the Policy for failure to provide the promised defense."

St. Paul counters that the Hurvitzes did not allege a claim for bad faith failure to defend in their complaint or raise the issue of nonpayment of attorney fees in opposition to the motion for summary judgment. The reply brief asserts that the issue was raised in the complaint and in the separate statement of undisputed facts.

Preliminarily, we note that because the matter comes to us as the result of the trial court's grant of the motion for summary judgment, St. Paul bore the initial burden of showing that one or more elements of each cause of action alleged in the complaint could not be established or that there was a complete defense to each such cause of action. (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850.) On the other hand, it was not required to refute liability on some theoretical possibility not included in the complaint. (*Joseph E. Di Loreto, Inc.* v. *O'Neill* (1991) 1 Cal.App.4th 149, 156.) A defendant moving for summary judgment "need address only the issues raised by the complaint" (*Government Employees Ins. Co. v. Superior Court* (2000) 79 Cal.App.4th 95, 98-99, fn. 4) and is not "bound to address unpleaded issues in its motion" (*Gafcon, Inc. v. Ponsor & Associates* (2002) 98 Cal.App.4th 1388, 1424). The plaintiff "cannot bring up new, unpleaded issues in his or her opposing papers" (*Government Employees Ins. Co. v. Superior Court, supra*, 79 Cal.App.4th at p. 99, fn. 4) because "summary judgment cannot be *denied* on a ground not raised by the pleadings" (*Bostrom v. County of San Bernardino* (1995) 35 Cal.App.4th 1654, 1663).

The complaint here was ambiguous on whether there was an intent to assert an independent claim for recovery of additional attorney fees. The only reference to failure to pay counsel is set forth in paragraph 10, which alleged that St. Paul breached the terms of the policy and engaged in bad faith conduct by "attempt[ing] to coerce [the Hurvitzes] into accepting a settlement with [Dr.] Hoefflin which was contrary to their financial interests by: [¶] . . . [¶] . . . [r]efusing to pay five months of invoices for *Cumis* counsel defense costs incurred by [the Hurvitzes]." There was no separate cause of action for additional attorney fees or specific plea for unpaid attorney fees in the prayer. In reading the complaint, St. Paul could have reasonably believed that the allegation concerning failure to pay counsel was advanced for the sole purpose of supporting the claim that St. Paul unfairly attempted to coerce the Hurvitzes into acceding to the settlement with Dr. Hoefflin.[11] Under this interpretation, its burden on summary judgment would have been limited to establishing as a matter of law that there was no need to obtain the Hurvitzes' consent to settle.

As we have seen, St. Paul did read the complaint in this way, stressing the terms of the policy giving it the absolute right to settle and ignoring the specific factual allegations relating to the Hurvitzes' claim that they had been unfairly coerced. The trial court agreed with this approach, ruling that St. Paul was entitled to summary judgment on the

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[11] It is possible to imagine various reasons why the Hurvitzes would have deliberately omitted an independent claim for additional attorney fees. Civil Code section 2860, the statute governing appointment of independent counsel, provides that "[a]ny dispute concerning attorney's fees . . . shall be resolved by final and binding arbitration . . . ." (§ 2860, subd. (c).) The Hurvitzes might not have wished to pursue arbitration simultaneously with their civil lawsuit. (See *Caiafa Prof. Law Corp. v. State Farm Fire & Cas. Co.* (1993) 15 Cal.App.4th 800, 803, italics omitted ["If the only issue in dispute truly was the amount of *Cumis* counsel fees the insurance company owed, it would be improper, in most circumstances at least, for a trial court to stay the arbitration proceeding mandated under section 2860 in order to allow a judicial proceeding in the California courts to decide that issue and that issue alone. . . . [¶] [The California Legislature] has decided that within the California courts these *Cumis* fee issues are to be decided in an arbitration forum, not the state's judicial forum"].) Alternatively, the Hurvitzes might not have actually incurred the fees due to some arrangement with King & Ferlauto such as a contingent fee agreement.

first cause of action because "[t]he policy expressly gave [St. Paul] the right to settle claims within the policy limits and to do so without the consent of the insured" and that therefore "[the Hurvitzes'] dissatisfaction with the terms of the settlement does not give rise to a claim." There was no reference to underpayment of counsel in the court's order.

The Hurvitzes had an opportunity in their opposition to the summary judgment motion to clear up the ambiguity in the complaint. They could not have failed to notice that St. Paul made no specific reference to attorney fees in its statement of undisputed facts. The statement said generally that "St. Paul did not withhold policy benefits." In their counterstatement, the Hurvitzes added as additional facts that "[f]rom November 29, 1999, through March 22, 2000, King & Ferlauto was the only firm defending the [Hurvitzes] in the defended actions" and "St. Paul refused to pay the legal fees incurred by [the Hurvitzes'] independent counsel from November 29, 1999 through April of 2000." But their opposition memorandum did not raise as grounds for denial St. Paul's failure to fully respond to the allegations of the complaint due to its failure to address attorney fees as a distinct claim. With respect to the breach of contract/bad faith cause of action, the opposition raised only the following four arguments: "St. Paul did not have the right to settle [No. 602], because St. Paul refused to provide a defense in that action"; "St. Paul did not have a right to settle [Dr.] Hoefflin's claims asserted against [Mrs.] Hurvitz, because she withdrew the tender of her defense"; "An insurer does not have an unfettered right to settle claims made against the insured against the insured's consent"; and "St. Paul breached its obligation under the policy by refusing to appoint independent counsel during St. Paul's settlement efforts."

At the hearing on the motion for summary judgment, counsel for the Hurvitzes missed another opportunity to clarify any intent they may have had to pursue an independent claim for additional attorney fees. Instead, in counsel's argument, attorney fees were again tied to the contention that St. Paul unfairly attempted to coerce the Hurvitzes into accepting a settlement that it had no right to impose on them. Specifically, counsel stated: "When St. Paul desired to settle this case in November of '99 and they found out the Hurvitzes opposed their desire to settle this case, they took certain steps to

coerce the Hurvitzes into accepting the settlement. Some of those steps violated their obligations under the policy and their obligations under Civil Code section 2860. One of the things that they did was that they refused to pay *Cumis* counsel for fees that they incurred for the past three months in defending the Hurvitzes in the underlying actions. Then they withdrew the reservation of rights claiming that that did away with necessity of *Cumis* counsel. And then they appointed Richard Charnley to monitor the proceedings. . . . And since there was an extreme disagreement between St. Paul and the Hurvitzes concerning the propriety of this settlement, there was a conflict of interest between St. Paul and the Hurvitzes, and that created a conflict of interest for any attorney who might represent both St. Paul and the Hurvitzes during the settlement negotiation."

Finally, when the trial court issued its detailed minute order "without . . . even offering an explanation [for] why [it] was granting judgment as a matter of law to St. Paul, when St. Paul was obviously in breach of the Policy for failure to provide the promised defense," the Hurvitzes could have objected or sought clarification. They made no attempt to do so.

In short, the record reflects no action undertaken on the part of the Hurvitzes or their counsel to alert either St. Paul or the trial court to the possibility that the Hurvitzes intended to assert a separate claim for additional payment of attorney fees in their complaint. The allegations concerning inadequate payment to counsel were always discussed in the context of the Hurvitzes' claim that St. Paul engaged in bad faith conduct by attempting to coerce them into settling with Dr. Hoefflin against their interest and their claim that St. Paul breached a duty to provide *Cumis* counsel during settlement negotiations. As a result, neither St. Paul nor the trial court had an opportunity to deal with the attorney fee allegations as an independent claim. It would be unfair for a reversal to be based on an "overlooked" issue where the appealing parties failed to avail themselves of numerous opportunities to have the matter resolved before the trial court. We agree with St. Paul that the issue was waived.

Moreover, we see little likelihood that the Hurvitzes' would have prevailed on a claim that St. Paul was obligated to pay King & Ferlauto after November 29, 1999, when St. Paul withdrew its reservation of rights and appointed Charnley. The underlying policy contained standard language forbidding the insured from "assum[ing] any financial obligation or pay[ing] out any money without [St. Paul's] consent." Such clauses bar reimbursement for *pre-tender* legal expenses based on "the equitable rule that '"the insurer [is invested] with the complete control and direction of the defense"' and cannot be expected to pay for that which it does not control." (*Tradewinds Escrow, Inc. v. Truck Ins. Exchange* (2002) 97 Cal.App.4th 704, 710.) "Only when the insured has requested and been denied a defense may it ignore the 'no voluntary payment' provision of the policy." (*Ibid*.) The same rule should apply to preclude the insured from voluntarily incurring expenses *after* the insurer has agreed to assume the defense without reservation and appoints new counsel of its own choosing. Thus, in order to recover any amounts paid to King & Ferlauto during the period between November 29, 1999, and March 22, 2000, from St. Paul, the Hurvitzes would have to demonstrate that the payments were not "voluntary" in the sense that they had no choice but to continue to run up legal expenses until new counsel formally substituted in due to the posture of the case. (Cf. *Tradewinds Escrow, Inc. v. Truck Ins. Exchange, supra*, at p. 711 [pointing out that "payments may be involuntary where the circumstances of the case show the payments were out of the insured's control" and that "where the urgency of time pressures requires the insured to expend money pre-tender, the no voluntary payments provision will not apply"].) The Hurvitzes described no acts crucial to their defense performed by King & Ferlauto prior to the time Charnley substituted in that could not have awaited the formal substitution. The trial court did not err in granting summary judgment in spite of any attorney fee claim the Hurvitzes intended to assert.

DISPOSITION

The judgment is affirmed.

CERTIFIED FOR PARTIAL PUBLICATION.

CURRY, J.

We concur:

VOGEL (C.S.), P. J.

HASTINGS, J.